# Mohd Pancha bin Abdullah & Anor v Tham Kut Cheong & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–1308 OF 2000
ABDUL AZIZ ABDUL RAHIM J
1 SEPTEMBER 2009

*Civil Procedure — Pleadings — Illegality — Whether court may take cognisance of illegality even if not pleaded — Whether party who consciously withdrew issue of illegality could be allowed to raise issue of illegality again — Whether approbation and reprobation allowed*

*Contract — Breach — Breach of duty — Fiduciary duty — Defendants breached joint venture agreement by misrepresenting to plaintiffs number of shares converted under agreement — Whether amounting to breach of fiduciary duty*

*Contract — Breach — Misrepresentation amounting to breach — Misrepresentation as to number of shares converted pursuant to joint venture agreement — Whether amounted to breach of contract*

*Contract — Formation — Oral agreement — Defendants denying existence of oral joint venture agreement — Whether existence of agreement established — Whether defendants could partially admit agreement and deny terms to his disadvantage*

*Contract — Misrepresentation — Fraudulent misrepresentation — First defendant making positive assertion to plaintiffs not warranted by information in defendants' possession — Whether fraudulent misrepresentation established — Whether second defendant conspired with first defendant to mislead and deceive plaintiffs — Contracts Act 1950 s 18*

The claim for breach of contract arose from an alleged joint venture agreement ('JVA') between the plaintiffs and the first defendant. The JVA was basically for the plaintiffs to assist the listing of Techventure Bhd ('TVB') by approaching the relevant authorities for the necessary approval and in return the plaintiffs would be invited to purchase the bumiputera shares in Kotak Kajang Sdn Bhd ('KKSB') and Insulfex Sdn Bhd ('ISB'). To assist the plaintiffs in the purchase of the shares, the first defendant was to obtain financing from a third party and these shares were to be converted to TVB shares upon listing of TVB. As further

consideration for the first defendant obtaining the finance for the plaintiffs to purchase the shares, the plaintiffs agreed to sell 50% of the TVB shares allocated to him to the first defendant. The plaintiffs claimed that upon approval of the listing the 4,750,000 shares in KKSB and 1,250,000 shares (making a total of 6,000,000) shares purchased by the plaintiffs, were converted to 8,788,852 TVB shares. However, the first defendant represented to the plaintiffs that the shares had been converted to 4,606,795 TVB shares only. The first defendant now disputed the JVA, contending that the purported JVA was a loan arrangement between the first plaintiff and the first defendant with no defined or exact terms being laid out. The defendants also raised that issue of illegality in attempting to nullify the JVA.

**Held**, allowing the plaintiffs' claims in part with costs:

(1) The defendants had conveniently denied some of the terms of the JVA in the plaintiffs' amended statement of claim which were not in the defendants' favour. The defendants must either admit to the existence of the JVA and justify their avoidance of the terms or wholly deny the existence of the JVA. The defendants could not partially admit the JVA and deny the terms that were to his disadvantage. On the balance of probability, there was a JVA, albeit orally between the first plaintiff and the first defendant (see paras 53 & 55).

(2) By stating to the plaintiffs the lower number of shares TVB converted than the actual number of 8,778,852 shares, the first defendant had breached the JVA as to the 50-50 basis of sharing the profit. This was because 2,303,397.5 TVB shares informed to the plaintiffs was definitely below 50% of the actual 8,778,512 converted TVB shares. Therefore, the first defendant had wrongfully and intentionally made misrepresentation to the first plaintiff on the conversion of the KKSB and ISB shares to TVB shares under the JVA (see para 88).

(3) The first defendant had breached the JVA for not returning the shares to the plaintiffs and for not giving the plaintiffs the profit from the sale of those shares and for pledging the shares with OCBC Finance as collateral for the loan without the consent of the plaintiffs (see para 91).

(4) Once a party places a trust in another to do certain acts, it is expected of the other party to act in utmost good faith so as not to breach the trust. The plaintiffs were not only misled by the defendants as to the number of TVB shares converted, but the defendants had also sold the shares that were supposed to be given to the plaintiffs. There was a breach of fiduciary duty by the first defendant to the plaintiffs (see para 92).

(5) The first defendant was guilty of misrepresentation as defined in s 18 of the Contracts Act 1950. There was fraudulent misrepresentation by the first defendant because the first defendant made a positive assertion to the

plaintiffs that the six million KKSB and ISB shares were converted to 4,606,795 TVB shares only when such assertion were not warranted by the information in the possession of the first defendant, and as a result of that misrepresentation it caused the plaintiffs to mistakenly agreed to the number of TVB converted shares. The plaintiffs had fulfilled the three elements identified by the court in *Tiga Gajah Cho Heng Sdn Bhd v Majuperak Tepung Beras Sdn Bhd* [1997] 4 MLJ 504; [1997] 1 CLJ Supp 52 (see paras 96–97).

(6) The conduct of the second defendant clearly showed that the second defendant was a party to the first defendant's dishonest act in presenting the inaccurate statements of account to the first plaintiff. Thus, the second defendant had conspired with the first defendant to mislead and deceive the plaintiffs on the true status of the accounts on the TVB shares (see para 107).

(7) Illegality need not be specifically pleaded and the court can take cognisance of the issue and the parties relying on it may make submissions on it at the end of the trial if the facts supporting the evidence of illegality in the transaction is sufficiently adduced. However in this case, the defendants had consciously and with full knowledge of the purported illegality of the transaction, withdrew the issue from being considered by the court. It implied therefore that the defendants were not relying on the issue and had no intention to bring it to the court's attention. However in its revised written submissions tendered to court, learned counsel revisited the issue and raised it again. This was not right. The defendants cannot and should not be allowed to approbate and reprobate (see para 109).

**[Bahasa Malaysia summary**

Tuntutan untuk pelanggaran kontrak timbul daripada perjanjian usahasama yang dikatakan ('PUS') antara plaintif-plaintif dan defendan pertama. PUS itu pada asasnya untuk plaintif-plaintif membantu menyenaraikan Techventure Bhd ('TVB') dengan berjumpa dengan pihak berkuasa yang berkaitan untuk kelulusan yang perlu dan sebagai balasan plaintif-plaintif akan dipelawa untuk membeli saham Bumiputera dalam Kotak Kajang Sdn Bhd ('KKSB') dan Insulfex Sdn Bhd ('ISB'). Bagi membantu plaintif-plaintif membeli saham itu, defendan pertama perlu memperoleh pembiayaan daripada pihak ketiga dan saham tersebut akan ditukarkan kepada saham TVB setelah TVB disenaraikan. Sebagai balasan selanjutnya untuk defendan pertama yang memperoleh bantuan kewangan bagi plaintif-plaintif membeli saham itu, plaintif-plaintif bersetuju menjual 50% daripada saham TVB yang diagihkan kepadanya kepada defendan pertama. Plaintif-plaintif mendakwa bahawa setelah kelulusan penyenaraian 4,750,000 saham KKSB dan 1,250,000 saham ISB (yang membawa kepada sejumlah 6,000,000 saham) yang dibeli oleh plaintif-plaintif, telah ditukarkan kepada 8,788,852 saham TVB. Walau

bagaimanapun, defendan pertama telah mengemukakan kepada plaintif bahawa saham tersebut telah ditukarkan kepada 4,606,95 saham TVB sahaja. Defendan pertama kini mempertikaikan PUS, dengan menegaskan bahawa PUS yang dikatakan itu satu aturan pinjaman antara plaintif pertama dan defendan pertama tanpa apa-apa syarat terperinci atau tertentu dikemukakan. Defendan-defendan juga membangkitkan isu kepenyalahan undang-undang dalam cubaan membatalkan PUS.

**Diputuskan**, membenarkan sebahagian tuntutan plaintif-plaintif dengan kos:

(1) Defendan-defendan dengan mudah menafikan beberapa syarat PUS dalam penyataan pindaan tuntutan yang tidak menyebelahinya. Defendan-defendan perlu sama ada mengaku kewujudan PUS dan menjustifikasikan mereka mengelak melaksanakan syarat-syarat itu atau secara keseluruhan menafikan kewujudan PUS itu. Defendan tidak boleh hanya mengaku tentang PUS dan menafikan syarat yang tidak menyebelahinya. Atas imbangan kebarangkalian, terdapat PUS, meskipun secara lisan antara plaintif pertama dan defendan pertama (lihat perenggan 53 & 55).

(2) Dengan menyatakan kepada plaintif-plaintif bilangan saham TVB yang lebih rendah daripada bilangan sebenar 8,778,852 saham, defendan pertama telah melanggar PUS tentang asas keuntungan bersama 50-50. Ini kerana 2,303,397.5 saham TVB yang diberitahu kepada plaintif-plaintif sememangnya kurang 50% daripada 8,778,512 jumlah sebenar saham tukaran TVB. Oleh itu, defendan pertama telah dengan salah dan sengaja, melakukan salahnyataan kepada plaintif pertama mengenai penukaran saham KKSB dan ISB kepada saham TVB di bawah PUS (lihat perenggan 88).

(3) Defendan pertama telah melanggar PUS kerana tidak memulangkan saham kepada plaintif dan tidak memberikan plaintif keuntungan daripada jualan saham tersebut dan kerana mencagarkan saham tersebut kepada OCBC Finance sebagai kolateral untuk pinjaman tanpa persetujuan plaintif-plaintif (lihat perenggan 91).

(4) Apabila suatu pihak meletakkan kepercayaan kepada pihak yang satu lagi untuk melakukan tindakan tertentu, ia menjangkakan pihak yang satu lagi itu bertindak dengan niat baik dan tidak melanggar amanah itu. Plaintif-plaintif bukan sahaja ditipu oleh defendan-defendan tentang bilangan saham TVB yang ditukar tetapi defendan-defendan juga telah menjual saham yang sepatutnya diberikan kepada plaintif-plaintif. Terdapat pelanggaran kewajipan fidusiari oleh defendan pertama kepada plaintif-plaintif (lihat perenggan 92).

(5) Defendan pertama bersalah kerana memberi gambaran yang salah sepertimana ditafsirkan dalam s 18 Akta Kontrak 1950. Terdapat

gambaran salah berunsur fraud oleh defendan pertama kerana defendan pertama telah membuat penegasan positif kepada plaintif-plaintif bahawa 6 juta saham KKSB dan ISB telah ditukar kepada 4,506,795 saham TVB walhal penegasan sedemikian tidak wajar berdasarkan maklumat milikan defendan pertama, dan akibat daripada gambaran yang salah itu ia telah menyebabkan plaintif-plaintif tersilap bersetuju dengan bilangan tukaran saham TVB itu. Plaintif telah mematuhi ketiga-tiga elemen yang dikenalpasti oleh mahkamah dalam kes *Tiga Gajah Cho Heng Sdn Bhd v Majuperak Tepung Beras Sdn Bhd* [1997] 4 MLJ 504; [1997] 1 CLJ Supp 52 (lihat perenggan 96–97).

(6) Perbuatan defendan kedua jelas menunjukkan bahawa defendan kedua adalah pihak kepada tindakan tidak jujur defendan pertama yang mengemukakan penyata akaun yang tidak tepat kepada plaintif pertama. Oleh itu, defendan kedua telah bersubahat dengan defendan pertama untuk memperdaya dan menipu plaintif-plaintif tentang kedudukan sebenar akaun saham TVB (lihat perenggan 107).

(7) Kepenyalahan undang-undang tidak perlu diplid secara spesifik dan mahkamah boleh mengambil perhatian tentang isu tersebut dan pihak-pihak yang bergantung kepadanya boleh membuat penghujahan tentangnya di akhir perbicaraan jika fakta-fakta yang menyokong keterangan tentang kepenyalahan undang-undang dalam transaksi itu telah dikemukakan sewajarnya. Walau bagaimanapun dalam kes ini, defendan-defendan dengan sedar dan penuh pengetahuan tentang kepenyalahan undang-undang transaksi yang dikatakan itu, telah menarik balik isu itu daripada dipertimbangkan oleh mahkamah. Ia memberi makna tersirat bahawa defendan-defendan tidak bergantung kepada isu itu dan tiada niat untuk membawanya kepada perhatian mahkamah. Walau bagaimanapun dalam semakan semula penghujahan bertulisnya yang dikemukakan ke mahkamah, peguam terpelajar kembali kepada isu itu dan membangkitkannya lagi. Ini tidak wajar. Defendan tidak boleh dan tidak patut dibenarkan aprobat dan reprobat (lihat perenggan 109).]]

**Notes**

For cases on breach in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2566–2823.

For cases on breach of duty, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2597–2598.

For cases on fraudulent misrepresentation, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4503–4518.

For cases on illegality, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6060–6063.

For cases on oral agreement, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3809–3810.

**Cases referred to**

*Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328, HC (refd)

*Lonrho Ltd v Fayed & Ors (No 5)* [1993] 1 WLR 1489, CA (refd)

*Mrs Kok Wee Kiat v Kuala Lumpur Stock Exchange Berhad & Ors* [1979] 1 MLJ 71, FC (refd)

*Rookes v Barnard* [1964] AC 1129, HL (refd)

*Soosan Trading Co Ltd v Tawau Auto Sdn Bhd & Ors* [1997] 4 CLJ Supp 519, HC (refd)

*Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265, CA (refd)

*Tiga Gajah Cho Heng Sdn Bhd v Majuperak Tepung Beras Sdn Bhd* [1997] 4 MLJ 504; [1997] 1 CLJ Supp 52, HC (refd)

**Legislation referred to**

Contracts Act 1950 ss 17, 17(a), (b), (c), (d), (e), 18

*Firoz Hussein (Puthucheary Firoz & Asmat) for the plaintiffs.*
*KY Leong (S Sothi Leong & Partner) for the defendants.*

**Abdul Aziz Abdul Rahim J:**

**[1]** Before I begin, I wish to state for the record that I am not the trial judge for this case. The trial of this case was conducted before three High Court judges one of whom is now a Court of Appeal judge, another has retired as a Federal Court judge and the third has passed away. I am the fourth High Court judge to handle this case and my role is only to decide on the merits of the case. What follows is my decision based on the record of proceedings, the bundles of documents filed, the exhibits tendered and the evidence and witness statements by the witnesses as recorded.

**[2]** The plaintiffs' claim relate to a joint venture which was established between the plaintiffs and the first defendant in respect of the acquisition of the bumiputera block of shares in a company known as Techventure Bhd ('TVB') which was listed on the second board of the KLSE in 1997.

**[3]** The plaintiffs owned Advantage World Travel Sdn Bhd ('AWT') — a 100% bumiputera company registered with MITI. The second plaintiff is the wife of the first. In her witness statement exh P2, the second plaintiff states that she left everything to her husband the first plaintiff in respect of this transaction.

**[4]** It is not disputed the parties had agreed to undertake a joint venture on a 50:50 basis and share the TVB shares and the proceeds of their disposal equally.

**[5]** The second defendant is the wife of the first defendant and at the time of the listing of TVB was one of the shareholders and held 1,181,567 (7.8%) ordinary shares in Kotak Kajang Sdn Bhd ('KKSB'). This is evident in exh D16 — the prospectus for the listing of TVB at p 18.

**[6]** The first defendant was the financial advisor to TVB on the listing of TVB. He advised the parties seeking the listing to obtain the assistance of the first plaintiff to secure the listing of TVB. Accordingly, the directors and shareholders ('the original shareholders') of KKSB and ISB sought the assistance of the first defendant to list Techventure.

**[7]** The listing of TVB involved, inter alia, the acquisition of shares in two companies namely KKSB and ISB and the issue of shares in TVB as payment to the shareholders of KKSB and ISB.

**[8]** In another related development, Mastika Nuri Sdn Bhd ('Mastika Nuri') who was one of the shareholders of KKSB and Insulfex Sdn Bhd ('ISB') who held 3,750,000 ordinary shares representing 25% of the issued capital of KKSB and 1,250,000 ordinary shares representing 25% of the issued capital of ISB (exh D16 — the prospectus at pp 18–19) had indicated its intention to dispose of its shareholding in KKSB and ISB. The original shareholders of KKSB and ISB (Ong Kin Chua, Ong Peng Nam, Ong Peng Chor, Ong Eow Cheng, Kwok Sow Moy and Tan Choon Liah) purchased the MNSB shares in KKSB and ISB.

**[9]** On 2 October 1995, Mr Ong Kin Chua, the Managing Director of TVB, wrote to the plaintiffs on behalf of the original shareholders seeking the plaintiffs' assistance in obtaining listing of TVB. In return for the plaintiffs' assistance it was proposed that the plaintiffs (through Advantage) participated in the purchase of 30% of the (bumiputera) shares in TVB through the acquisition of 4,750,000 shares in KKSB and 1,250,000 shares in ISB which would be subsequently converted to TVB shares upon the listing of TVB. A copy of the letter is exhibited as exh MPA1 in PW1's witness statements exh P1.

**[10]** The KKSB and ISB shares which were offered to the plaintiffs pursuant to the letter dated 2 October 1995. Exhibit P1 — MPA1 comprised of shares which were originally registered in the name of a company known as Mastika Nuri and also included shares registered in the name of Mohd Kassim bin Aris all of which were subsequently included in the JVA.

**[11]** By an agreement dated 23 October 1996 (exh D17) the original shareholders sold to the plaintiffs a total of six million shares comprising 4,750,000 ordinary shares in KKSB and 1,250,000 ordinary shares is ISB as enumerated in the schedule thereto the respective amounts at a price of RM2 per share.

**[12]** TVB was successfully listed in November 1997. The exchange price between the companies was approximately RM1.33 per ordinary share (p 18 of exh D16). The Mastika Nuri shares in KKSB and ISB were converted to 4,655,005 ordinary shares and 2,892,512 ordinary shares respectively and thereby a total of 7,547,517 ordinary shares in TVB.

**[13]** The shares in KKSB and ISB that were offered to the plaintiffs were shares owned by MNSB.

**[14]** On or about October 1995, the first defendant also approached the plaintiffs with a proposal for joint venture.

**[15]** The plaintiffs contend that there was an oral joint venture agreement between the plaintiffs and the defendants.

**[16]** The first plaintiff claims the terms of the joint venture as follows. The first plaintiff would assist in obtaining necessary approval from the relevant authorities the listing of TVB. That the defendants agreed to assist the plaintiffs with the financing and money to buy the shares and that it was agreed that the first defendant would obtain such financing and money from a friendly third party whose identity was not disclosed or known to the plaintiffs. The first defendant would be responsible for advising the plaintiffs on all regulatory requirements pertaining to the listing of TVB. The shares purchased by plaintiffs in KKSB and ISB would be converted into TVB shares. That the plaintiffs agreed subsequently to sell to the first defendant 50% of his TVB shares, in consideration for introducing the plaintiffs to the original shareholders of KKSB and ISB and to obtain finance to enable the plaintiffs to purchase the shares.

**[17]** That the plaintiffs agreed some of his TVB shares be deposited as collateral with the friendly party providing the financing until the plaintiffs settled the loans obtained to finance the purchase. However, the shares would continue to be registered in the name of MNSB and MKA. This is mainly to ensure that the listing of TVB is not affected.

**[18]** That in the event the first defendant sold or disposed off TVB shares belonging to the plaintiffs, the proceeds of the sale would be paid to the plaintiffs, so is any dividend earned by the plaintiffs, TVB shares.

**[19]** It was also agreed, according to the plaintiffs, that the party would deduct the costs of the borrowing arising from the facility provided by the first defendant. A

**[20]** The plaintiffs also said that the first defendant agreed to hold the plaintiffs' shares in TVB on trust prior to those shares being transferred to the plaintiffs. B

**[21]** The first plaintiff claimed that the original shareholders were to pay the plaintiffs a sum of RM1.5m as administrative expenses incurred in the listing of TVB and the first defendant was to pay Abdul Rashid money RM1,250,000 out of the sum for the latter assistance in securing the listing of TVB and for permitting his company MNSB to be used as a nominee company. C

**[22]** The plaintiffs and the first defendant also agreed to make contribution of RM500,000 as administrative expenses incurred in obtaining the listing and this money to be held and applied by the plaintiffs. D

**[23]** Pursuant to the joint venture agreement, the plaintiffs entered into sale and purchase agreement with the various members of the original shareholders to purchase the MNSB's and shares in KKSB and ISB. E

**[24]** The first defendant also deposited various sum in OCBC account No 701–114066–3 to enable the purchase of the shares by the plaintiffs. F

**[25]** The first plaintiff and Rashid also agreed on or about May 1996 that MNSB to act as nominee for the plaintiffs in the listing exercise, for a fee of RM500,000. It was also agreed that Rashid would be paid RM750,000 for his assistance in making the necessary application to the Securities Commission. G

**[26]** Rashid was eventually paid the sum RM500,000 by a cheque No 699311 dated 5 October 1996 drawn on the OCBC account 701–114066–3. H

**[27]** In carrying out his part of the agreement, the first plaintiff wrote to MOF to inform that the proposed bumiputera holding in TVB held by MNSB was being offered to Advantage and applied to the MOF for assistance to request the Securities Commission to review the decision on the listing of TVB. I

**[28]** Prior to the listing, the first plaintiff was appointed as chairman designated of TVB and represent the company in its dealing with Securities Commission, the FIC and the Ministry of Trade.

**[29]** A formal application for listing of TVB was made on 4 October 1996 and was subsequently approved in February 1997 and TVB was listed in March 1997 on the second board.

**[30]** The plaintiffs claimed that upon approval of the listing the 4,750,000 shares in KKSB and 1,250,000 shares (making a total of 6,000,000) shares purchased by the plaintiffs, were converted to 8,788,852 TVB shares.

**[31]** However, the first defendant represented to the plaintiffs that the shares have been converted to 4,606,795 TVB shares only.

**[32]** Relying on this representation, the plaintiffs had on 4 October 1997 on his own behalf, on behalf of the second plaintiff entered into interim agreement with the first defendant.

**[33]** In the interim agreement the plaintiffs agreed that TVB shares due to the plaintiffs were 2,303,397.5 only and that the total outstanding loan to the first defendant was RM5,280,407 with interest to be adjusted on payment date. It was also agreed that 1,000,000 TVB shares will be returned to the plaintiffs before 15 October 1997 and the remaining 1,303,397.5 TVB shares will be held as collateral until the outstanding loan is settled.

**[34]** The 1,000,000 TVB shares was eventually transferred to the plaintiffs.

**[35]** However the plaintiffs contend that the interim agreement was void and of no effect because of misrepresentation made to the plaintiffs by the first defendant on the conversion of the KKSB and ISB shares (the bumiputera shares) to TVB shares. The plaintiffs claimed that the conversion was to 8,788,852 shares and not 4,606,795 shares only as informed by the first defendant. The plaintiffs contended that the first defendant has manipulated the joint venture agreement accounts to support such misrepresentation to the plaintiffs and therefore the presentation was made fraudulently.

**[36]** The first defendant admitted that the plaintiffs owned Advantage and had in fact advanced the plaintiffs RM300,000 (in total) as working capital for Advantage. The first defendant and the plaintiffs were old friends since the university days. However the sum RM300,000 advanced had since been returned to the first defendant by the first plaintiff.

**[37]** The defendants contended that MNSB held 25% of issued capital of KKSB and 25% of the issued capital of ISB.

**[38]** The defendants also contended that the term of listing of KKSB is that 30% of the issued share capital of KKSB must be held by a bumiputera. In this regard the defendants contended that 5% of the KKSB issued share capital was held by one Mohd Kassim bin Mohd Aris ('MKA'). A

**[39]** At the material time, 7.87% of the issued shared capital of KKSB was held by the second defendant, who is also the wife of the first defendant. B

**[40]** In para 7 of the defendants' statement of defence, the first defendant denied advising the original shareholders to obtain the assistance of the first plaintiff in the listing of TVB. The first defendant claimed he only advised the original shareholders the MNSB shares must continue to be held by bumiputera and in this respect he had proposed the plaintiffs as the purchasers of those shares. The defendants said they or the original shareholders did require or request the assistance of the first plaintiffs. C D

**[41]** The facts is that the listing of the TVB would not be approved unless 30% KKSB shares remained with a bumiputera.

**[42]** The first defendant admitted that Mr Ong Kin Chuah, MD of TVB wrote to the first plaintiff on 2 October 1995 a letter (exh D13) offering 30% of TVB shares through its purchase of 4,750,000 KKSB shares and 1,500,000 ISB shares. But the first defendant says that the shares were not wholly belong to MNS. The first defendant contends that MNSB only owned 25% of KKSB and 25% of ISB which is equivalent to 3,750,000 shares and 1,250,000 shares respectively — making a total of 5,000,000 shares; the other 5% (of 1,000,000 shares) was held by MKA who had no intention of disposing them. E F

**[43]** The first defendant denied any joint venture agreement with the plaintiffs as claimed by the plaintiffs in para 17 of the amended statement of claim, though the defendants agreed that the first plaintiff assisted in attendance at the Ministry of Trade. G

**[44]** The first defendant contended that the first plaintiff was aware of the identity of the third party, which was OCBC Finance Bhd, from whom the first plaintiff obtained a personal loan taken in the name of the second defendant. H

**[45]** The first defendant also averred that the 50% of the plaintiffs' TVB shares which the plaintiffs agreed to transfer to the first defendant was originally held by MNSB. The first defendant also said that the first plaintiff agreed to pay the first defendant a management fee of 10% of net profits earned by the plaintiffs. I

**[46]** To finance the purchase of the 'shares' by the plaintiffs, the defendants have obtained a loan from OCBC Finance under the name of the second defendant. And the loan was secured by pledging the TVB shares that was supposed to be given to the plaintiffs.

**[47]** Later the plaintiffs also discovered that the shares were registered in the name of Malaysia Nominees (Tempatan) Sdn Bhd. The plaintiffs contended that all those were done without their knowledge and consent.

**[48]** It is not disputed that on or about 26 November 1997 at the request of the first defendant, the plaintiffs lent the first defendant 250,000 shares to be used as collateral for the loan.

**[49]** On the above facts the paintiffs raised several issues, inter alia, fraudulent misrepresentation, breach of contract and breach of fiduciary duty.

**[50]** From the evidence, it appears to me that the claim for breach of contract arises from the alleged joint venture agreement between the plaintiffs and the first defendant. To my mind, the joint venture agreement is basically for the plaintiffs to assist the listing of TVB by approaching the relevant authorities for the necessary approval and in return the plaintiffs would be invited to purchase the bumiputera shares in KKSB and ISB. To assist the plaintiffs in the purchase of the 'shares' the first defendant would obtain financing from a third party. And these shares were to be converted to TVB shares upon listing. And as further consideration for the first defendant obtaining the finance for the plaintiffs to purchase the shares, the plaintiffs agreed to sell 50% of the TVB shares allocated to him to the first defendant.

**[51]** It is the plaintiffs' contention that the term of the joint venture agreement between the plaintiffs and the first defendant in October 1995 were as stated in para 17.1–17.15 of the plaintiffs' amended statement of claim dated 8 March 2002 as summarised above.

**[52]** The first defendant, in particular, disputes the joint venture agreement. It is the contention of the defendants the purported joint venture agreement was a loan arrangement between the first plaintiff and the first defendant with no defined or exact terms being laid out.

**[53]** However my view is that the joint venture agreement is a real thing with all the terms and obligation of the parties clearly outlined. I say so because in their amended defence, the defendants have admitted either wholly or with qualification paras 17.3, 17.4, 17.5, 17.6, 17.7, 17.10, 17.12, 17.13, 17.14, 17.15 of the plaintiffs' amended statement of claim. What were stated in those paragraphs are the contention by the plaintiffs as to the terms of the joint

venture agreement. What is to be noted is that the defendants have conveniently denied some of the terms of the joint venture agreement in the plaintiffs' amended statement of claim which are not in the defendants' favour or that puts the defendants to a disadvantage. In my view, the defendants cannot do that. The defendants must either admit to the existence of the joint venture agreement and justify their avoidance of the terms or wholly deny the existence of the joint venture. The defendants could not, in my view, partially admit the joint venture agreement and deny the terms that are to his disadvantage.

**[54]** Furthermore ID12, which is a letter dated 11 May 1999 written by the first plaintiff to the first defendant (see pp 628–629 — bundle of exhibit Vol 3), the plaintiffs reiterated the salient features of the agreement between the parties with regard to the listing of the TVB and the purchase of KKSB and ISB shares by the plaintiffs. In that letter, the plaintiffs categorically request the the first defendant to revert back to him, before 22 May 1999 if the first defendant disagree with any of the facts stated in the letter, failing which the first plaintiff shall assume that the first defendant agrees with the content of the letter. Having perused the records of the trial, I find no evidence to show that the first defendant had written to the first plaintiff to challenge the contents of the letter ID12.

**[55]** Therefore on the balance of probability, I am convinced that there is joint venture agreement, albeit orally between the first plaintiff and the first defendant.

**[56]** On the balance of probability also, I find that the second defendant was aware of the joint venture agreement. I based my finding on exh D10, which is a letter by the first plaintiff dated 15 May 1999 (see pp 755–756 — bundle of exhibit Vol 4) addressed to the second defendant who is also the first defendant's wife. In that letter the first plaintiff refer to a phone call by the second defendant on 13 May 1999 at about 4.30pm in which the second defendant informed the first plaintiff that she had received the letter ID12 which was addressed to her husband.

**[57]** It is also my finding that following the arrangement between the first plaintiff and the first defendant and the original shareholders of KKSB and ISB, the plaintiffs (through their company Advantage) were invited to participate in the listing of the TVB.

**[58]** This is obvious from exh D13, a letter dated 2 October 1995 by KC Ong the Managing Director of TVB (p 638 of bundle of exhibit Vol 3) addressed to Advantage for the attention of the first plaintiff. In that letter KC Ong referred to recent discussion between the first plaintiff and the first

defendant on the possible listing of TVB on the second board of KLSE. The letter speaks of the original shareholders agreement in principle for the plaintiffs' company — Advantage — to participate in the listing by purchasing 30% of TVB shares through the purchases of KKSB and ISB shares of 4,750,000 and 1,250,000 respectively which has a nominal share value of RM1 per shares at RM2 per shares. The letter also informed the plaintiffs that the plaintiffs have to contribute to the operating expenses of RM4m towards the listing exercise. The plaintiffs were given two months from the date of the letter to take up the offers.

**[59]** Though the plaintiffs did not take up the offer within the prescribed period, it is not disputed that eventually the plaintiffs did subscribe to the shares. This is obvious because it had been shown that the first defendant did take some action to raise the money to assist the plaintiffs to purchase the shares namely by taking up a loan with OCBC Finance under the name of the second defendant.

**[60]** The next question is how many of the KKSB and ISB share were purchased by the plaintiffs and from these shares how many converted to TVB shares?

**[61]** Before I proceed further, I wish to state that it is my considered opinion that the 30% shares in KKSB and ISB offered to the plaintiffs are the bumiputera block of shares. It is not in dispute that the 30% KKSB and ISB shares offered to the plaintiffs were shares held by MNSB a company wholly owned by Rashid Manaf. MNSB is a bumiputera company; so in all probabilities the 30% holding by MNSB is KKSB and ISB is a bumiputera holdings. Furthermore, in the course of the listing exercising, KC Ong the Managing Director of TVB has written exh D13 to the plaintiffs' company. The defendants contended that the letter D13 was for the purpose of showing to MITI that in the listing of TVB the 30% of bumiputera equity was retained. It is the submissions of the defendants that D13 would be destroyed if MITI does not require such letter — contending that in any event the combined shares holding of MNSB in KKSB and ISB when converted upon listing would not made up 30% of TVB share capital.

**[62]** I do not agree with the defendants' counsel submission on this point. I think if the intention of writing the letter is to mislead the MITI, the original holders could be committing a serious offence and the act would jeopardise the listing exercise of the TVB, because it is a fact that one of the condition of listing is that there must be 30% holding by bumiputera. In this regard, I preferred the version by the plaintiffs that the letter D13 was indeed a genuine offer to the plaintiffs to participate in the listing exercise of TVB by purchasing 30% of the shares in the form of KKSB and ISB shares. I am fortified in view

of this because no evidence was led by the defendants to show that the letter was ever shown to MITI and KC Ong was not call to testify on the defendants' version of the letter D13. Further, as submitted by the plaintiffs counsel, subsequent to the letter, the plaintiffs and the original shareholders (including the second defendant) signed sale and purchase agreement of 23 October 1996 (D17) for the six million shares sold to the plaintiffs.

**[63]** Under cross-examination the first defendant was equivocal as to the sales and purchase agreement (exh D17). The first defendant at first denied its existence and latter admitted that he was aware of it as it was signed by his wife the second defendant. Thus I agree with the plaintiffs' counsel that the evidence by the defendants on exh D17, the sales and purchase agreement dated 23 October 1996 clearly shows that the first defendant is dishonest and had not been truthful in his evidence.

**[64]** To revert back to the original question, my answer is that a total of six million shares — the combination of KKSB shares and ISB shares were sold to the plaintiffs.

**[65]** The first plaintiff testified under cross-examination that the paid up capital of KKSB is 15,000,000 and the paid up of ISB is 5,000,000. And these shares were converted to 18,629,954 and 11,570,044 TVB shares respectively.

**[66]** The plaintiffs also admitted under cross-examination that he did not know the exact holding of MNSB in KKSB and ISB on 2 October 1995. The plaintiffs also agreed with the suggestion by counsel for the defendants that the offer of 4,750,000 KKSB shares and 1,250,000 ISB shares would not amount to 30% of the total TVB shares when converted to TVB shares.

**[67]** The plaintiffs also testified under cross-examination that looking at p 18 of the prospectus for the listing of TVB, before the listing MNSB held 3,750,000 KKSB shares and 1,250,000 ISB shares (a total of 5,000,000 shares) which in term of percentage is about 24.99% of KKSB and 25% of ISB shares. Based on this evidence it seems that the defendant's claim that only 5,000,000 shares of KKSB and ISB combined were sold to the plaintiffs and this shares comprised of 3,750,000 ordinary shares in KKSB and 1,250,000 ordinary shares in ISB belong to MNSB is correct as testified by the first defendant at para 4 of his witness statement — exh D5.

**[68]** However based on exh D17, the total number of shares (in KKSB and ISB combined) that were sold to the plaintiffs were six million shares.

**[69]** As to the difference, the first defendant explained in his witness statement (para 7 in exh D5) that the 1,000,000 that made up the total of six

million were actually shares in KKSB belonging to Mohd Kassim bin Hj Mohd Aris ('MKA') which the first defendant claimed MKA has no intention to sell.

**[70]** Firstly, I preferred to accept the contents of exh D17 — the total combined shares of KKSB and ISB that were sold to the plaintiffs were six million.

**[71]** Secondly, I think the purchase of the shares in KKSB and ISB by the plaintiffs includes the purchase of one million shares held in the name of MKA.

**[72]** MKA in his witness statement exh D29, admitted that he was the registered owner of one million shares in KKSB that represents 6.66% of the issued share capital of KKSB. He also corroborated the claim by the first defendant, in para 7 of his exh D29, that at the material time MNSB only hold 3,750,000 (or 24.9%) shares in KKSB and 1,250,000 (or 25%) shares in ISB. Further MKA states in para 11 of his witness statement exh D29 that he has no intention to sell his holding of the shares to make up the requisite 30% of TVB bumiputera shares in KKSB for the purpose of listing of TVB because his holding was already constituted 5% of the requisite bumiputera holding is KKSB.

**[73]** However, the plaintiffs contended that MKA held the shares as nominee for the original shareholders.

**[74]** On the evidence, and on balance of probabilities, I prefer the submission by the plaintiffs that MKA held the shares as nominee for the original shareholders. Further in his witness statement exh D29, MKA never denied that he was nominee of the original shareholders. He testified in the court that he assisted KKSB to convert an agricultural land in Kapar to industrial use. He become a shareholder in KKSB — 1980 and was made a director of the company (KKSB). He was given the shares; but more importantly MKA testified that he did not pay for the shares.

**[75]** Further, when he was asked about the payment of RM50,000 to act as nominee MKA said he could not remember. But in answer to the same question by the court then, MKA admitted that there was payment of RM50,000 but not for being nominee.

**[76]** MKA also testified that upon conversion of KKSB shares to TVB shares, he sold off all his shares in KKSB (which were 1,241,335 after conversion) to the first defendant or the first defendant's relative and to KC Ong, one of the original shareholders in the amount of 30% and 70% respectively at the price of RM2.80 per shares. MKA testified that he was paid RM50,000 for the shares. However at RM2.80 per share for 1,241,335 shares, the amount would

be RM3,475,738. It simply does not tally with the amount which MKA said he was paid for the shares. It is for these reasons that I am of the view that on the balance of probabilities, MKA's 1,000,000 shares in KKSB was held by MKA as nominee and the shares form part of the joint venture agreement between the plaintiffs and the first defendant.

**[77]** On the evidence it is not disputed that the six million shares in KKSB and ISB purchased by the plaintiffs were converted to 8,788,852 TVB shares. This is evident by the plaintiffs' statement at para 30 of his witness statement exh P1.

**[78]** It is also corroborated by the first defendant evidence under cross-examination. Referring to the prospectus for the listing of TVB at encl 32 (exh D16), the first defendant testified that it was issued on 15 September 1997 and referring to p 25–26 of D16, the first defendant testified that 4,655,005 TVB shares were given for KKSB shares and 2,892,512 TVB shares were given for ISB shares for the MNSB shares thus making a total of 7,547,517 shares. And for MKA total shares in KKSB 1,241,335 TVB shares were given. Therefore the total number of TVB shares given for six million shares were 7,788,852 shares.

**[79]** The cost of the purchase of the six million KKSB and ISB shares was RM12m. This evidence is from the witness statement (exh P3) of PW3, who is a chartered accountant engaged by the plaintiffs to investigate into the purchase of the shares, and to ascertain the number of TVB shares acquired pursuant to the joint venture and as to the number of TVB shares due to the plaintiffs.

**[80]** From his investigation, as stated in his witness statement (exh P3) PW3, found that the plaintiffs had purchased 15,008,000 KKSB shares (which constitute 31.55% of the issued paid up shares) and 5,000,000 ISB shares (which constitute 25% of the issued paid up shares) for RM12m, calculated at the price of RM2 per share.

**[81]** It is also not disputed that the first defendant and the first plaintiff have agreed to split the profit of the TVB shares on 50–50% basis. On this basis, the amount of TVB shares (after conversion of the six million KKSB and ISB shares) due the plaintiffs is 4,394,426 (ie 50% of 8,788,852).

**[82]** However the first defendant have informed the plaintiffs that the KKSB and ISB shares were converted only to 4,606,795 TVB shares; and therefore based on 50–50 basis the total number of TVB shares due to the plaintiffs were 2,303,397.5 only. Clearly therefore their representation to the plaintiffs is not accurate and not supported by the evidence.

**[83]** However, based on the representation, the first plaintiff entered into an interim agreement with the defendants dated 4 October 1997 (exh MPA7 in PW1, witness statement exh P1).

**[84]** Based on the agreement the plaintiffs acknowledged that the outstanding loan due to the defendants for the purchase of the shares were RM5,280,407 (which is to be adjusted for interest on payment date). Also, 1,000,000 TVB shares to be returned to the plaintiffs before 15 October 1997 (this was actually done on 9 October 1997) and the balance of 1,303,397.5 shares to be held as collateral for the loan.

**[85]** On the foregoing evidence as to the conversion of six million KKSSB and ISB shares to 8,778,802 TVB shares it is obvious that the representation by the first defendant to the plaintiffs on the number of shares converted to TVB shares were inaccurate. In my view the plaintiffs had gone for it because the plaintiffs and the first defendant have been a long time friends — since the university days and that they have several dealings before on friendly basis. I would think therefore that the plaintiffs would put his trust in the first defendant. In his witness statement exh P1, at para 15, the plaintiff (SP1) states:

> In view of my long standing friendship with 1st Defendant I trusted him completely. I relied completely on his advice, skill and judgment. He is an accountant of many years standing and I believed that he would act properly and in good faith in relation to our joint venture agreement.

**[86]** In my view the first defendant has taken advantage of this trust.

**[87]** The plaintiffs have asked this court to rule that the interim agreement as null and void because of the misrepresentation or to the number of shares converted to TVB shares. *However the first defendant is not relying on this agreement. In the circumstances, I am not going to declare the interim agreement as null and void*. The only defect in the agreement is that the first defendant had wrongfully informed the plaintiffs on the number of TVB shares converted. I do not think that this fact alone induces the plaintiffs to enter into the interim agreement. To my mind the plaintiffs would have entered into the agreement anyway regardless as to how many TVB shares were converted. This is so because firstly, the first defendant had agreed to transfer one million TVB shares to the plaintiffs. Secondly, the fact that the first defendant has arranged the finance for the purchase of the shares is true and that the shares were used to be as collateral and the loan was also a fact. This is corroborated by the fact that subsequent act of the plaintiffs by lending 250,000 shares to the first defendant to be used as further collateral for the loan to finance the purchase of the shares by the plaintiffs.

**[88]** By stating to the plaintiffs the lower number of shares TVB converted than the actual number of 8,778,852 shares the first defendant may have in mind to deny the plaintiffs a bigger profit. This is understandable as the first defendant did most of the work. The first defendant may think that he deserved a bigger share of the profit. But be as it may, it is clear that in so doing the first defendant has breached the joint venture agreement as to the 50–50 basis of sharing the profit. This so because 2,303,397.5 TVB shares informed to the plaintiffs were definitely below 50% of the actual 8,778,512 converted TVB shares. Therefore, I would conclude that the first defendant has wrongfully and intentionally made misrepresentation to the first plaintiff on the conversion of the KKSB and ISB shares to TVB shares under the joint venture.

**[89]** It is also a fact that save for 750,000 shares (1,000,000–250,000) from the total 4,394,426 TVB shares due to the plaintiffs, none of the shares were transferred to the plaintiffs herein. Seemingly the shares were used as collateral for the loan.

**[90]** However the evidence (as found by PW3 — see paras 12–14 of exh P3) the first defendant has sold some of the shares and had made a profit. All in all the first defendant has sold 5,069,000 shares.

**[91]** Therefore it is my finding that the first defendant has breached the joint venture agreement for not returning the shares to the plaintiffs and for not giving the plaintiffs the profit from the sale of those shares and for pledging the shares with OCBC Finance as collateral for the loan without the consent of the plaintiffs.

**[92]** As to the existence of the fiduciary duty, learned counsel for the first defendant, at para 19.6 of his written submissions dated 27 April 2009, admitted that the arrangement between the plaintiffs and the first defendant were on trust basis but say that is not the same as in the legal sense of trustee and cestui que trust. Therefore, there is no fiduciary relationship. I disagree. To me, once a party placed a trust in another to do certain acts, it is expected of the other party to act in utmost good faith so as not to breach the trust. Here, the plaintiffs have relied on the first defendant for the arrangement as to the purchase of the shares and had even agreed that the shares due to him were to be used as collateral to finance the purchase. However the plaintiffs were not only misled by the defendants as to the number of TVB shares converted, but the defendants have also sold the shares that were supposed to be given to plaintiffs. Learned counsel for the defendants cited *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 as authority to argue that on the fact of this case there is no fiduciary relationship between the first defendant and the plaintiffs. In that

case, Gopal Sri Ram JCA (as he then was), said in delivering the judgment of the court (at p 294) that the courts adopt a flexible approach when according to a particular relationship as being fiduciary in nature. He further said that it depends on the judicial impression upon the fact pattern of a given case. For that reason there is truth in the maxim that 'the categories of fiduciary relations are never closed'. Having gone through some of the authorities on the issue, the Court of Appeal in that case was of the view (at p 295) that 'whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the courts of a particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function'. But what is important to note is that the categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate that relationship. No single test of the existence of fiduciary relationship can fit all. A test which might seem appropriate for one purpose might be quite inappropriate for another purpose. The Court of Appeal, after reviewing the authorities on the law, stated at p 300: 'It is noteworthy that the fiduciary doctrine has even been extended to those in negotiation for a partnership or a joint venture'. Thus on the facts of this case as I have alluded to above on this issue my finding is that there is a breach of fiduciary duty by the first defendant to the plaintiffs.

**[93]** Next, can one say the first defendant is guilty of fraudulent misrepresentation against the plaintiffs.

**[94]** Section 17 of the Contracts Act 1950 defines 'fraud' to include any of the acts specified paras (a) – (e) of that section, done by one party with intent to deceive another party or to induce that other party to enter into a contract. Two of the acts mentioned are relevant. They are paras (c) and (d). Paragraph (c) of s 17, refer to 'suggestion as to a fact of that which is not true by one who does not believe it to be true'; and para (d) refer to 'the active concealment of a fact by one having knowledge of belief of the fact'.

**[95]** On the evidence in this case it is without doubt that the first defendant have concealed the fact as to the actual number of TVB shares converted from the six million KKSB and ISB shares. It is also obvious that the first defendant did not believe the fact that only 4,606,795 TVB shares were converted from the six million KKSB and ISB shares. This have to be so because the defendants must have been aware, as advisor to the listing exercise, that the six million shares in KKSB and ISB were converted to 8,778,852 TVB shares.

**[96]** In the circumstances it is also my opinion that the first defendant is guilty of misrepresentation as defined in s 18 of the Contracts Act 1950. Even if one is to argue that the representation by the first defendant was made

innocently, I would think that there is still fraudulent misrepresentation by the first defendant because the first defendant has made a positive assertion to the plaintiffs that the six million KKSB and ISB shares were converted to 4,606,795 TVB shares only when such assertion were not warranted by the information in the possession of the first defendant, and as a result of that misrepresentation it has caused the plaintiffs to mistakenly agreed to the number of TVB converted shares as stated in the interim agreement (exh MPA7 in P1) as to the number of TVB converted shares from the KKSB and ISB shares.

**[97]** As to the facts in this case with regard to fraud by the first defendant, I think the plaintiffs have succeeded in showing that the plaintiffs have fulfilled the three elements identified by the court in *Tiga Gajah Cho Heng Sdn Bhd v Majuperak Tepung Beras Sdn Bhd* [1997] 4 MLJ 504; [1997] 1 CLJ Supp 52, where it was held (ie held No 5) that '... Upon examining the various authorities these elements seem to co-exist to establish fraud namely, an actual deception and intention to deceive, an actual injury or possible injury, by means of deceit and actual knowledge that the act was calculated to injuries owing neighbor'.

**[98]** And in *Soosan Trading Co Ltd v Tawau Auto Sdn Bhd & Ors* [1997] 4 CLJ Supp 519, Ian HC Chin J, held that fraud is dishonesty of some sort and it implies a willful act, whereby another is sought to deprived by unjustifiable means of what he is entitled.

**[99]** Clearly on the evidence in this case all the elements to constitute fraud as held in the two cases referred to above are present. Therefore, I am convinced that the first defendant is guilty of fraudulent misrepresentation.

**[100]** The next question is whether the second defendant also guilty of conspiring with the first defendant to defraud the plaintiffs? As a start, it may be said that conspiracy is the agreement between two or more people to do unlawful act or to do a lawful act by unlawful means: *Soosan Trading Co Ltd v Tawau Auto Sdn Bhd & Ors*. The above definition of conspiracy is in fact stated in the Federal Court case of *Mrs Kok Wee Kiat v Kuala Lumpur Stock Exchange Berhad & Ors* [1979] 1 MLJ 71 where at p 72 of the judgment, the court cited with approval the above definition as found in *Clerk & Lindsell on Torts* (13th Ed) at p 817.

**[101]** Of course, before the second defendant can be found to conspire with the first defendant to defraud the plaintiffs, there must be established actual fraud ie a willful act of dishonesty of some sort by the first defendant (and in this case assisted by the second defendant) to deprive by unjustifiable means of

the plaintiffs is entitled to. And that the fraudulent act must be proved beyond reasonable doubt: *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328.

**[102]** As to the evidence of fraud in this case, the first defendant had stated in the first set of accounts (exh D15) which he provided to the plaintiffs on 4 October 1997 that the total number of TVB shares for the purpose of the JVA was 4,606,795 shares. It has been shown earlier that this figure is not correct. As I have said earlier, the first defendant is the advisor to TVB on the listing exercise. And there is the prospectus (exh D16) issued for that purpose. Therefore, it must be obvious and within the knowledge of the first defendant as to how many shares were converted to TVB shares. It is to be noted that exh D16 was issued on 15 September 1997 ie prior to the first set of accounts that was given to the plaintiffs by the first defendant. Furthermore, the first defendant has admitted that he was aware of the conversion of those shares under the joint venture. This is evident by the admission contained in para 27 of the re-amended statement of claim where the defendants admitted para 40 of the amended statement of claim though the defendants contended that the computation was based on the figures available then.

**[103]** In para 40 of the amended statement of claim the plaintiffs have averred that on or about 4 October 1997 the first defendant represented to the plaintiffs that the shares had been converted into 4,606,795 TVB shares. It is to be noted also that the first and second defendant has in their witness statements and oral testimonies contended that number of shares registered in the name of MNSB that were offered to the plaintiffs totaled only five million shares. If based on this figure the total number of TVB shares on conversion would be 7,547,517 and not 4,606,695 as stated by the first defendant in the first set of accounts in exh D15.

**[104]** Another evidence of the first defendant dishonesty is with regard to the second set of accounts (exh D8) given to the plaintiffs in which the first defendant had deliberately omitted 1,077,370 TVB shares worth RM3,512,226.20 from the accounts. Under cross-examination by the plaintiffs counsel, the first defendant testified that he did on 17 July 1999 represented to the first plaintiff that the KKSB and the ISB shares have been converted to 6,106,795 (sic — should it not be 6,606,795?) TVB shares and that he further agreed that he had deliberately omitted those shares from the account. It is also not disputed the value of those shares at RM3.26 per share at the material time was worth RM3,512,226.20.

**[105]** In exh D8, the first defendant also intentionally stated that a loan was from one Mr Wee and that 500,000 TVB shares had been sold off to Mr Wee. On the evidence in this case I find that this is not true. This is so because it is

the defendants' contention and evidence that the loan was obtained from OCBC Finance and the TVB shares were pledged as a collateral for the loan. Therefore, I agree with the submission of learned counsel for the plaintiffs that this was done intentionally to mislead and deceive the plaintiffs. This is obvious when the first defendant under cross-examination testified (see notes of proceedings on 16 October 2003) that he had put the figure 500,000 shares to push off the plaintiffs and that he admitted that the information in exh D8 was not accurate.

**[106]** The second defendant is the wife of the first defendant. Under cross-examination the first defendant testified that his wife the second defendant assisted in his business venture and in particular assisted him in the joint venture. The first defendant testified that his wife the second defendant was present during negotiations with the plaintiffs and that she was aware of his actions in the joint venture. The first defendant further testified that the second defendant pledged the joint venture shares of KKSB in TVB. The first defendant also testified under cross-examination (notes of proceedings on 15 October 2003) that his dealing with the first plaintiff on the joint venture was on trust basis and his wife the second defendant was aware of the trust basis of the dealing in the joint venture shares and that the second defendant was aware of the trust basis when she pledged shares with the financier of the joint venture shares.

**[107]** The first defendant also testified under cross-examination (notes of proceedings on 16 October 2003) that when he gave the account statement P8 (sic — should it not read D8?) to the plaintiffs his wife the second defendant was aware of the figure because he told her about it. As to the omission in exh D8 the first defendant testified that when he showed it to the second defendant the latter did not disagree but kept quiet. In my opinion this conduct of the second defendant clearly shows that the second defendant is a party to the first defendant's dishonest act in presenting the inaccurate statements of account in exh D8 to the first plaintiff. In the circumstances I conclude that the second defendant has conspired with the first defendant to mislead and deceive the plaintiffs on the true status of the accounts on the TVB shares.

**[108]** One other issue that I would like to deal with in this case is illegality. This issue is in relation to the contention that the business licence that was issued to KKSB had a requirement of 30% bumiputera block of shares and that the shares held by MNSB in KKSB and ISB and by MKA in KKSB were the requisite bumiputera block of shares which were subsequently purchased by the plaintiffs under the joint venture with the first defendant pursuant to the listing exercise of the TVB. With regard to this issue, it is to be noted that the defendants had earlier included it as one of their defence and in response to it

A the plaintiffs had prepared a supplementary witness statement to response to the issue. However on 4 August 2008 the defendants, in open court, formally withdrew its allegations of illegality. The plaintiffs did not object to the withdrawal and consequently the plaintiffs also withdrew the supplementary witness statement on the issue.

B

**[109]** The law on illegality is that it need not be specifically pleaded. The court can take cognisance of the issue and the parties relying on it may make submissions on it at the end of the trial if the facts supporting the evidence of illegality in the transaction is sufficiently adduced and tendered in court for consideration. However in this instant case, the defendants have consciously and with full knowledge of the purported illegality withdrew the issue from being considered by the court. It implies therefore that the defendants are not relying on the issue and have no intention to bring it to the court's attention for consideration. However in its revised written submissions tendered to court, learned counsel revisited the issue and raised it again for consideration by the court. I think that is not right. The defendants cannot and should not be allowed to do that. The defendants can approbate and reprobate.

C

D

E **[110]** In my view, the defendants in resuscitating the issue of illegality are attempting to nullify the JV with the plaintiffs on the basis that the plaintiffs had agreed with the first defendant to sell 50% of the bumiputera block of shares in TVB which were held by the plaintiffs.

F

**[111]** In any event however there is no clear evidence being adduced by the defendants or the plaintiffs to show that KKSB and ISB shares that were purchased by the plaintiffs were bumiputera block of shares. It was assumed by the parties in this case to be bumiputera block of shares. Firstly, that the shares were bumiputera shares was never pleaded in the defence. Secondly, no KKSB licence was produced in court to show that the requirement of 30% of bumiputera shares in KKSB. Thirdly, Abdul Rashid Manaf, who purportedly owned (no conclusive evidence on this) MNSB was ever called to testified that the shares owned by MNSB in KKSB that were subsequently purchased by the plaintiffs were bumiputera block of shares in KKSB.

G

H

**[112]** In the circumstances, I find no merits in this issue.

**[113]** On the foregoing reasons, I will find for the plaintiffs. In particular:

I

(a) under prayer (a) there shall be a declaration that the plaintiffs beneficially 3,644,426 of TVB shares (the Pancha shares);

(b) under prayer (b), no declaration is made for the reasons stated earlier in this judgment;

(c) under prayer (c) no declaration is made. However the court finds that the second defendant has conspired with the first defendant to defraud the plaintiffs;

(d) under prayer (d) the defendants are hereby order to deliver to the plaintiffs the Pancha shares;

(e) for prayers (e), (f), (g) and (h) damages shall be assessed by senior assistant registrar against the first defendant only. My reason for this is that second defendant is not privy to the JV though she was aware of it;

(f) there will be no order on prayer (i) *Mcgregor on 'Damages'* (16th Ed 1997) states at p 287 para 430 that 'the primary object of an award of damages is to compensate the plaintiffs for the harm done to him; a possible secondary object is to punish the defendants for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindicative damages or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence or the like'. But the House of Lords in *Rookes v Barnard* [1964] AC 1129 had expressed the view that except in a few exceptional cases, it is no longer necessary to award this damage however outrageous his conduct. These exceptional cases fall into three categories — namely oppressive, arbitrary or unconstitutional conduct by government servant; conduct calculated to result in profit and express authorisation by statue. In this respect I do not think the defendants' case comes within any of the three categories mentioned. There may some truth to say that the defendants did make some profit as consequence of the first defendant making false representation to the plaintiffs with regard to the number of converted TVB shares through the sale of those shares. However consideration must be given to the fact under the JV most the work was done by the first defendant including arranging for loan for the purchase of the shares by the plaintiffs. The state of mind of the first defendant must be considered when making the false representation. Under the joint venture it is not disputed that the plaintiffs have agreed to contribute to the costs or expenses for the listing where then estimated at RM4m and this is to be shared equally between the directors (who were also the original shareholders) of KKSB and ISB, the first defendant and the plaintiffs. The first defendant had testified that when it made that representation he based it on the information available to him at that particular time. It could have been therefore that the first defendant had taken into account the plaintiffs' share of the contribution to the listing exercise. For that reason, I think the first defendant's conduct in this case cannot be concluded as being intentionally calculated to make a profit from the

false declaration. Furthermore, in this case the court, in awarding that aggravated damages to be assessed against the first defendant, has taken into consideration the first defendant's conduct in relation to fraudulent misrepresentation. In this regard the court is satisfied that the plaintiffs have shown that the conduct of the first defendant was so obnoxious as to warrant the award of aggravated damages;

(g) under prayer (j) there shall be an award of damages for the plaintiffs against the second defendant only, for conspiracy to defraud the plaintiffs. In *Lonrho Ltd v Fayed & Ors (No 5)* [1993] 1 WLR 1489 it was held that in tort of conspiracy, once some pecuniary loss is shown, the damages is not limited to precise calculation of the pecuniary loss actually proved. Instead the plaintiffs is entitled to damage at large. Under this heading the plaintiffs is entitled to recover from the second defendant damages as to pecuniary loss, loss of profit and damage for conspiracy generally. I am making this order against the second defendant because I have found the second defendant liable for conspiracy with the first defendant to defraud the plaintiffs. The second defendant was aware of the trust basis of the joint venture between the first defendant and the first plaintiff. She was also aware that the statement of account in exh D8 shown to the first plaintiff was inaccurate. Yet she remained silent when the first defendant presented the incorrect information to the first plaintiff;

(h) I will not make any order under prayer (k). As I said earlier, the second defendant is not a party to the joint venture, though she is fully aware of it. The alleged inducement of the breach here is that the second defendant had pledged the TVB shares beneficially belonged to the plaintiffs to OCBC Finance as collateral for the loan to finance the purchase of the shares by the plaintiffs. In my view she did that out of necessity. Otherwise OCBC Finance would not give the loan. The defendants explanation for going to OCBC Finance for the loan instead of going to a friendly third party one Mr Wee is because Mr Wee was not in a position to provide the financing required which is in the sum of RM10m. That explanation seems to be reasonable though it is still in breach of the joint venture because under the JV the first defendant had agreed with the plaintiffs that the financing for the purchase of the shares were to be made with a friendly third party. However the joint venture agreement exh D17 never disclosed who this third party is, notwithstanding the defendants' contention that the first defendant had informed the plaintiffs about obtaining the loan from OCBC Finance;

(i) I will also not make any order on prayer (l). Though there is evidence to show that there has been some agreement between the first defendant, the first plaintiff and Abdul Rashid Manaf that the latter would be paid the sum of RM750,000 to assist in the obtaining of approval from the

authorities on the listing of TVB, there is no evidence to show that Rashid had demanded this sum from the plaintiffs or that Rashid had filed any action to recover the promised sum. More importantly, the person entitled to this sum is Rashid; and he is not a party to the proceedings. If Rashid or his estate is keen to recover this sum he or his estate can always sue the plaintiffs for it and the plaintiffs in turn, and if necessary, may bring in the defendants as the third party to the action;

(j) as for prayers (n), (o) and (p), I will give order in terms to the plaintiffs;

(k) as for prayer (m) on the interest and the period payable for it, my decision will be this: the interest on the damages to be assessed by the registrar, the interest rate shall be 8%pa from the date the damages are assessed until its full payment. The interest rates for the loss of profit and pecuniary loss arising from unauthorised disposal of the Pancha shares shall be calculated at 6%pa from the date of the unauthorised disposal of those shares until date of this judgment. It is noted that through the evidence of PW3 by his witness statement exh P3, the disposal of the shares had taken place between 17 May 2000 to 29 May 2000. The total number of TVB shares disposed of within that period were 5,069,000. Since the court has found that the number of Pancha shares yet to be returned to the plaintiffs numbered 3,644,426 it means that some of the shares sold were not Pancha shares though it might be included. There is no evidence to show on which date within that period Pancha shares were sold. I would, for convenient, therefore hold that the date on which this interest is to be calculated is the last date in that period which is 29 May 2000; and

(l) with regards to the interest on money payable under prayer (p), the rate shall be 6%pa from 29 May 2000 until date of this judgment and thereafter at 8%pa until full and final settlement.

**[114]** Finally, the costs of this trial is awarded to the plaintiffs and costs to be taxed unless agreed.

*Plaintiffs' claims allowed in part with costs.*

Reported by Kanesh Sundrum